

# Exhibit C

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

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UNITED STATES OF AMERICA : No. 3:15CR155 (RNC)  
:  
vs. :  
:  
ROSS SHAPIRO, ET AL, :  
:  
Defendants. : HARTFORD, CONNECTICUT  
:  
----- x  
April 24, 2017

TELEPHONE CONFERENCE

BEFORE:

HON. ROBERT N. CHATIGNY, U.S.D.J.

Darlene A. Warner, RDR-CRR  
Official Court Reporter

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9:30 A.M.

COURT REPORTER: Good morning, Judge Chatigny has joined the conference. Please state your appearances.

MR. NOVICK: For the government, David Novick. Also present with me is Liam Brennan and Heather Cherry. Good morning, Your Honor.

THE COURT: Good morning.

MR. PETRILLO: Good morning, Your Honor, Guy Petrillo, Josh Klein, Amy Lester and Tom Daily; and Mr. Shapiro is on the line as well.

MR. MUKASEY: Good morning, Judge, Marc Mukasey from Greenberg Traurig. I'm with me colleague, Kedar S. Bhatia, a few others here for the defendant, Michael Gramins, who is here with us.

MR. BROWN: Good morning, Your Honor, Mike Brown, Alex Spiro and Brett Jaffee on behalf of Mr. Peters who is also on the line.

THE COURT: Good morning. This is a telephone conference to talk about the jury questionnaires and also the motions that remain to be resolved. We're getting feedback on this line unfortunately. I don't know why that is; but, can everybody hear me all right?

MR. NOVICK: From the government, yes, Your Honor.

1 SPEAKER: Yes, Your Honor, we can.

2 THE COURT: Not hearing differently, I assume  
3 everybody can hear me.

4 With regard to the jury questionnaires, you have  
5 received copies of the questionnaires. You've had an  
6 opportunity to review them and discuss them, and it's my  
7 understanding that as of this morning you have agreed that  
8 20 people should be excused for cause. In addition, there  
9 are 12 jurors with respect to whom for cause challenges  
10 have been raised by the defense but as to whom the  
11 government does not agree that the person should be  
12 excused. Then I gather we have quite a few people who  
13 have indicated that they would have great difficulty being  
14 available for one reason or another, and that group  
15 numbers, according to my chart, 61 people. So that's the  
16 status.

17 With regard to the stipulations that you have  
18 reached, I adopt your agreement as to those 20 and they  
19 will be excused accordingly.

20 With regard to the 12 people as to whom the  
21 defense has raised objection, does the government have  
22 anything to say as to any of those 12?

23 MR. NOVICK: Sure, Your Honor. I could go  
24 through them individually, but I think what would probably  
25 make most sense as a broad kind of global matter.

1 I think the government's position on those 12 is  
2 not necessarily that we wouldn't ultimately agree in some  
3 cases to a cause challenge, but that in reviewing the  
4 answers, it seems to us that additional questions would be  
5 appropriate, and if we were -- if we were in court, as we  
6 normally are when we go through this process, and those  
7 answers -- those questions were asked and those answers  
8 were given, that the Court or the Court either on its own  
9 or with the parties' suggestion, would likely follow up  
10 and ask additional questions to determine either about a  
11 conflict or an inability to sit medically or a view that  
12 may suggest a lack of impartiality.

13 Oftentimes we find out on further pressing that  
14 the issue that what the juror thought was an issue for  
15 them really isn't as a matter of fairness.

16 For example, someone who has seen the Big Short  
17 and thinks this case is all about the origination of RMBS  
18 and finds out it's really not, you know, that may change  
19 both the juror's and the parties' and the Court's view of  
20 whether there's a real conflict.

21 So that was kind of our analysis in driving  
22 these were were there follow-up questions that we thought  
23 were appropriate, and it's only fair to the remaining  
24 members of the jury pool that these jurors come in and be  
25 considered in terms of whether they're capable of being

1 fair and impartial.

2 THE COURT: Okay, that's fine. Then there's no  
3 need for you to comment as to any of these individually.

4 MR. NOVICK: Okay.

5 THE COURT: If we bring those folks in for voir  
6 dire, then we can ask the follow-up questions that you  
7 think are necessary rather than try to do it in the  
8 abstract based on the questionnaire responses alone.

9 At that rate, it's my understanding that  
10 removing the 20 by agreement would leave us with 102  
11 people; and as to that group, we would have the 12 with  
12 regard to whom objections have already been made.

13 Am I right that the government has an objection?

14 MR. NOVICK: Yes, Your Honor. We had an  
15 objection to one juror who I think answered that their  
16 religion prevented them from passing judgment on people.

17 THE COURT: That's juror 234, is that correct?

18 MR. NOVICK: That's right, Your Honor, yes.

19 THE COURT: Ordinarily when we have somebody who  
20 tells us that or something very much like that, the juror  
21 is excused from further service. Is there some reason why  
22 the defense wants me to hold on to this juror  
23 notwithstanding the juror's statement?

24 MR. BHATIA: Your Honor, Kedar Bhatia. We think  
25 that juror falls into the same category as some of the



1 others where additional questions would be appropriate.  
2 But ultimately we agree that this might be a cause  
3 challenge, but we thought it was better to ask at least to  
4 bring them in to talk to them.

5 THE COURT: Okay. Moving on from there, looking  
6 at the total situation, let's suppose that we have a  
7 hundred people who come into court to participate in voir  
8 dire, of that hundred, we have 61 who have already told us  
9 that for one reason or another they can't be available --  
10 is that correct?

11 Hang on please.

12 (Pause)

13 THE COURT: Okay. So we have a hundred people  
14 potentially coming to court and 40 of those people have  
15 indicated to us that for one reason or another they don't  
16 think they can be available. Are you comfortable going  
17 forward on that basis? Or do you think that we need to do  
18 something in addition in order to get a jury? Bearing in  
19 mind that you've had an opportunity to review the  
20 responses to the questionnaires and given that we're going  
21 to need a jury of 12 plus an appropriate number of  
22 alternates and given the number of peremptories that you  
23 are entitled to under the rule, not to mention the  
24 defense's suggestion that an additional number might be  
25 fair for the defense.

1           Given all those factors, are you comfortable  
2 going ahead with a hundred people, approximately 40 of  
3 whom have indicated that they don't think they should be  
4 here?

5           Mr. Novick?

6           MR. NOVICK: Your Honor, just so that I  
7 understand the sort of playing field here, the potential  
8 additional challenges that the defense has asked for  
9 which, you know, as a matter of fairness depending on the  
10 number the defense has asked for, the government may also  
11 request additional strikes, do we have an idea of, in  
12 doing our calculation in the potential for issues here,  
13 how many we're talking about of additional peremptories  
14 that the defense is asking for. I don't think we ever had  
15 discussions about actual numbers.

16          THE COURT: We have not.

17          MR. NOVICK: Because ordinarily, if we were  
18 talking about just a standard number of peremptories, I  
19 think the government would be fine with the number of  
20 jurors that we're looking at here. It's more than we  
21 normally have for a criminal case.

22               I understand that the case is longer than we  
23 normally have, so we're going to have more issues, but I  
24 think the numbers of people are appropriate here.

25               And I also would say that a lot of the 20 that

1 we've agreed to strike, those were, it seemed to us, in  
2 many cases, the sort of immovable conflicts, you know, for  
3 example, I have a plane ticket bought on such and such a  
4 date as opposed to a jury who says, you know, my job is  
5 really important, which perhaps we look less favorably  
6 upon as an excuse.

7 So I think a lot of the immovable conflicts will  
8 have been taken care of.

9 I just hesitate -- so ordinarily I would say the  
10 government thinks that we're fine with the number we have  
11 I guess with the caveat that I don't know, you know, how  
12 many peremptories we're really talking about here.

13 THE COURT: Does anybody want to speak on the  
14 defense side?

15 MR. MUKASEY: Judge, Marc Mukasey.

16 I think that an additional peremptory for each  
17 defendant, so three for the sort of three combined teams  
18 would be appropriate given the length and complexity of  
19 this case and are certainly permitted under the rules in  
20 Your Honor's discretion.

21 And I'll just offer a comment with respect to  
22 Mr. Novick's request for additional strikes for the  
23 government.

24 I don't think respectfully that this is an issue  
25 that should be treated proportionally. The reason we're

1 asking for extra strikes is because we have three defense  
2 teams here with three different defendants who operated at  
3 three different hierarchal levels at Nomura who come from  
4 three different law firms that are going to offer three  
5 different perspectives. I think we're largely on the same  
6 page, but we have individual clients to worry about, and  
7 offering each defendant one extra chance for the combines  
8 three teams. Three extra chances to ensure a fair and  
9 impartial jury in a case of this complexity I respectfully  
10 submit is important.

11 The government is the government. They don't  
12 have extra teams, they don't have extra clients, they're  
13 presenting the same case regardless. They're not meshing  
14 with other U.S. Attorney's Offices and they're not  
15 protecting the rights of three different people at the  
16 same time.

17 So at least as far as Mr. Gramins goes and to  
18 the extent that I speak for the three teams at this point,  
19 I think three additional defense peremptory challenges  
20 would be appropriate.

21 MR. PETRILLO: Your Honor, Guy Petrillo for  
22 Mr. Shapiro. We join in that application. We think that  
23 makes eminent sense.

24 MR. BROWN: As does Mr. Peters.

25 THE COURT: Mr. Novick?

1 MR. NOVICK: Sure, Your Honor. Respectfully I  
2 certainly understand the fact that there are three  
3 different defense teams here.

4 The government's request is a matter of  
5 fairness. We're all involved in a case which the defense  
6 has characterized just now as complex and lengthy, and  
7 that's true for all sides. And I understand that they  
8 each have clients to represent and the government though  
9 at the same time is prosecuting three distinct individuals  
10 at the same time.

11 And I am not suggesting that we need move  
12 proportionally. The rules as it is give the defense more  
13 strikes than the government as a general matter, and those  
14 are the rules; and so I'm not necessarily suggesting that  
15 we need receive three additional peremptories, but some  
16 number of additional peremptories I think would be fair.

17 The government has an interest, just like the  
18 defendant, to have a fair trial with a panel of jurors who  
19 are going to be fair and impartial as to both sides.

20 This is not just a question of protecting the  
21 defendants' rights, which I understand frankly is in the  
22 interest of all parties, but also the government's  
23 interest in having this case tried fairly.

24 THE COURT: Okay. How many alternates do you  
25 think we should seat given the experience in the Litvak

1 trial?

2 MR. NOVICK: From the government, Your Honor, I  
3 would say at least four, if not more.

4 I mean, I think, God willing, the issues that we  
5 had in the Litvak case will not repeat themselves,  
6 however -- and that was a much shorter trial in the end,  
7 which I hope this will be true for this one, but obviously  
8 they were planning for a longer trial, so I would say at  
9 least four, if not five.

10 THE COURT: How about on the defense side?

11 MR. BHATIA: Your Honor, we thought that four  
12 was an appropriate number for the alternates.

13 MR. PETRILLO: Agreed for Mr. Shapiro.

14 THE COURT: At that rate, let's suppose that we  
15 were to have four alternates. That would entitle each  
16 side to two additional peremptories. On that basis --  
17 gosh, I wish we didn't have that feedback on our system  
18 this morning, but be that as it may -- we have -- this is  
19 the arithmetic:

20 We have 12 regular jurors, and under the  
21 applicable rule, Rule 24 of the Federal Rules of Criminal  
22 Procedure, the parties would be entitled to 16  
23 peremptories in choosing the regular jurors, six for the  
24 government, ten for the defendants, so that would be 28;  
25 and if we add four alternates, that's 32 plus two

1 additional peremptories per side for the alternates. That  
2 brings us to 36. That is the number of regular jurors and  
3 peremptories as to regular jurors plus four alternates  
4 with peremptories as to the alternates.

5 That brings us to a total of 36, such that if we  
6 had 36 people qualified to serve, you could exercise your  
7 peremptories as against the regular jurors and we could  
8 seat 12, you could exercise your peremptories as against  
9 the alternates and we could seat four and we would be  
10 ready to go with our jury. That's what the law provides  
11 by rule.

12 I gather from what you said before, Mr. Novick,  
13 it's your view that if that's the number we need, you  
14 would be comfortable going ahead with the pool that we  
15 have at the moment, is that right?

16 MR. NOVICK: Yes, Your Honor.

17 THE COURT: And let me ask the defendants that  
18 question.

19 Putting aside for the moment your understandable  
20 interest in having as many peremptories as humanly  
21 possible, what do you say about going ahead with this pool  
22 if our minimal requirement is 36?

23 MR. PETRILLO: Your Honor, may I ask, to the  
24 extent that we thought it would be prudent to summon more  
25 juror candidates, is that feasible for the Court?

1           THE COURT: I don't think so. You will recall  
2           that we tailored our communications with prospective  
3           jurors in an attempt to make it absolutely clear that if  
4           anybody had any concern about the schedule, they had to  
5           opt out at the first step and not come here and fill out a  
6           questionnaire.

7           It's frustrating, to say the least, to be in a  
8           position where notwithstanding that, we see so many people  
9           coming in to tell us, belatedly, that they have a problem  
10          with the schedule.

11          But we cannot summon additional people in  
12          advance of our next court date, the first week of May.

13          MR. PETRILLO: Thank you.

14          I think it's our position for Mr. Shapiro, that  
15          we will endeavor to go forward with this group and we  
16          believe it will work out given the numbers and the  
17          questionnaire responses as we've seen them to date.

18          THE COURT: Other counsel on the defense side?

19          MR. SPIRO: Judge, this is Alex Spiro. I think  
20          that makes sense what Mr. Petrillo said.

21          MR. NOVICK: Your Honor, for defendant Gramins,  
22          we agree that the pool is fine as is.

23          THE COURT: Okay. Then I think the best way for  
24          us to proceed is to go ahead, bring the people in, hope  
25          that we'll have a group that is large enough to enable me



1 to give you additional peremptories. If I can I will, but  
2 I may not be able to.

3 I don't think that additional peremptories are  
4 strictly necessary in the interest of justice. I think  
5 that in this case given the defense that is common to the  
6 three defendants, i.e., that the misrepresentations were  
7 not material, the number of peremptories provided by the  
8 rule is adequate. At the same time, if I can give you  
9 additional ones, I'd be happy to do so. So we'll proceed  
10 accordingly.

11 With regard to the procedure, I outlined for you  
12 a procedure whereby we would arrange to speak with each  
13 person individually in the courtroom, if only briefly.

14 Is that something that appeals to you,  
15 Mr. Novick?

16 MR. NOVICK: Yes, Your Honor.

17 THE COURT: Okay. How about on the defense  
18 side?

19 MR. PETRILLO: For Mr. Shapiro that appeals to  
20 us.

21 MR. MUKASEY: For defendant Gramins, that  
22 appeals to us.

23 MR. BROWN: And the same for defendant Peters.

24 THE COURT: We'll proceed on that basis. In  
25 other words, we will endeavor to have a number of jurors

1 brought from the jury assembly room to the vicinity of the  
2 courtroom where they can conveniently await coming in and  
3 seeing us individually for a few minutes, and we'll  
4 structure this so that we minimize the waiting time for  
5 people in the pool.

6 I'm joined this morning here in chambers by  
7 Terri Glynn. And, Terri, I think we're going to need to  
8 prepare to do what we did last time. In other words, we  
9 can in effect release people so they can go get a cup of  
10 coffee, take a walk in the park, do whatever it is they  
11 want to do on the understanding that they're not going to  
12 be needed for some period of time, and in due course we'll  
13 work our way through the group of 100, if that's how many  
14 actually show up.

15 Once we complete that process, we can proceed  
16 with everybody who remains in the pool in the courtroom  
17 and do as I discussed, that is, bring a certain number  
18 forward to fill up seats.

19 There needs to be room to respond to  
20 contingencies as they arise. It may be that after we see  
21 people individually, the group will be reduced in size to  
22 the point where it really doesn't make sense to bring  
23 people forward to the jury box and we should instead treat  
24 the gallery as the jury box, if you will. We'll see.

25 But unless there's something further with regard

1 to that, I'll turn to the motions in limine.

2 Anything further on the jury selection?

3 MR. NOVICK: Not from the government, Your  
4 Honor.

5 MR. PETRILLO: Not from Mr. Shapiro, Your Honor.

6 MR. MUKASEY: Not for Mr. Gramins.

7 MR. BROWN: Or Mr. Peters.

8 THE COURT: Okay, thank you.

9 With regard to the motions, let me tell you what  
10 I have in mind.

11 The first one that I want to address is the  
12 motion concerning the defendants' total compensation.  
13 This requires me to apply Rule 403. Looking at the  
14 probative value of the spreadsheet that is attached to the  
15 government's memo, the government says that this  
16 spreadsheet is important evidence of the defendants'  
17 financial motive to engage in fraud, the hierarchy that  
18 existed on the desk and the conspiratorial agreement  
19 alleged in the indictment.

20 The spreadsheet shows the defendants' actual  
21 compensation on an annual basis for each of the years 2010  
22 through 2015. The highest annual compensation was in  
23 2013. For that year Mr. Shapiro's total compensation was  
24 [REDACTED]. Mr. Peters, [REDACTED], and Mr. Gramins  
25 [REDACTED].

1           The government says that it will offer the  
2     testimony of Mr. Raiff, the head of Securitized Trading  
3     Products as of mid-2012. The government says that  
4     Mr. Raiff will testify that Mr. Shapiro was mainly  
5     responsible for compensation decisions with regard to  
6     traders on the desk. Mr. Raiff is expected to testify  
7     that Nomura allocated bonus money to the desk based on,  
8     among other factors, the profitability of the desk.  
9     Mr. Raiff is expected to testify that in determining the  
10    size of the bonus pool, he reviewed the profit and loss  
11    figures for the desk. Finally, he is expected to testify  
12    that Mr. Shapiro disbursed the bonus pool as he saw fit.

13           In addition, the government says that it will  
14    offer the testimony of junior traders who will say that  
15    they knew the profitability of the desk had an impact on  
16    their compensation; that they were incentivized to squeeze  
17    every tick out of every trade, and they understood that  
18    this was important because it was tied to how well the  
19    desk performed which in turn impacted on their  
20    compensation.

21           The question I ask at the outset is: What  
22    probative value do the total compensation numbers have  
23    with regard to motive? The government says that the total  
24    compensation numbers show that the profitability of the  
25    desk directly impacted the defendants' compensation.

1           It's undisputed, as far as I know, that the  
2 defendants' compensation was affected to some extent by  
3 the profits produced by the desk. The question is to what  
4 extent was the profit based on the alleged misconduct?

5           The total compensation numbers themselves don't  
6 tell us to what extent the defendants' compensation was  
7 based on profits derived from fraudulent activities.  
8 There is no indication that a witness is prepared to say  
9 that profits from fraudulent trades increased the  
10 defendant's compensation by "X" amount or even "X"  
11 percent. There is no indication that the government will  
12 offer evidence of what the defendants' total compensation  
13 would have been without the fraudulent trades.

14           So the probative value of the total compensation  
15 numbers as proof of motive appears to me to be indirect,  
16 at best, and limited; and I think that if I allowed the  
17 total compensation numbers on that spreadsheet, I would  
18 need to have a stronger basis than that.

19           I say that because I think that the probative  
20 value of the actual compensation numbers with regard to  
21 motive on the record in front of me right now is  
22 substantially outweighed by the danger of unfair  
23 prejudice. Courts recognize that evidence of wealth can  
24 unduly prejudice a defendant during jury deliberations,  
25 and in this day and age, I think that remains true. I

1 think that concerns about inequality in wealth are very  
2 much on the minds of many, if not most, people these days  
3 and I'm sure the jurors would be struck by these numbers.

4 Can a jury instruction cure that? Well, I don't  
5 think you reach that question unless you have a stronger  
6 basis for putting the numbers in.

7 With regard to the probative value of the total  
8 compensation numbers as proof of hierarchy or  
9 conspiratorial agreement, I think the probative value is  
10 substantially outweighed by the same concern.

11 There is another danger that troubles me, and  
12 that is the risk of misleading the jury. If the  
13 government proposes to persuade the jury that these  
14 defendants were motivated to engage in fraud because it  
15 enabled them to pocket [REDACTED] and the  
16 government can prove that, then the total compensation  
17 numbers in the spreadsheet could come in. That would not  
18 mislead the jury. But if the government is less  
19 ambitious, if the government proposes to prove that it had  
20 some effect on the defendants' compensation, I think  
21 offering the numbers in the spreadsheet carries a danger  
22 of misleading the jury into believing that this was a  
23 [REDACTED] fraud when in fact it wasn't, and  
24 again a curative instruction may be helpful to deal with  
25 that danger, but I don't see a need to think in terms of

1     what such an instruction might look like in the absence of  
2     a stronger basis in probative value for submitting these  
3     numbers in the first place.

4             So the numbers aren't going to be mentioned in  
5     opening argument, we had already agreed to that, and  
6     they're not coming into evidence unless and until the  
7     government can persuade me that there's something new,  
8     something different. Maybe the calculus could change. It  
9     could be that not allowing the government to present these  
10    numbers would be misleading. It could be that the way the  
11    trial unfolds, the jury will be getting the impression  
12    that this was nickels and dimes and it really wasn't  
13    nickels and dimes, it was quite a bit more, and it may be  
14    that the calculus could change, but right now, I don't see  
15    a need for these numbers and I see that any need is  
16    substantially outweighed by these dangers that I've  
17    mentioned.

18            I would note that I've considered the  
19    government's other arguments, for instance, the argument  
20    that the numbers are necessary to rebut a suggestion that  
21    the defendants are being treated unfairly because the  
22    junior traders haven't been criminally charged. Again, I  
23    mean, I don't see that as a basis for allowing the  
24    government to offer these numbers up front. If it should  
25    turn out that the defendants are beating that drum, then

1 the calculus might change.

2 With regard to passive investors, the government  
3 wants to present evidence that the victim institutions  
4 managed money for sophisticated investors, sophisticated  
5 institutional investors, hedge funds, pension funds,  
6 endowments, mutual funds, sovereign wealth funds,  
7 insurance companies and the PPIP program. It's my  
8 understanding that there's no particular objection to  
9 evidence along this line, that is, there's no objection to  
10 the government offering that kind of general testimony,  
11 what might be thought of as generic testimony with regard  
12 to the identities of the passive investors.

13 Let me pause and ask: Is that correct?

14 MR. PETRILLO: Your Honor, Guy Petrillo for  
15 Mr. Shapiro.

16 We had objected on the defense side to the  
17 identification of pension funds and charitable  
18 institutions because of the potential that the jury would  
19 infer from the mention of those types of institutions that  
20 they're personally affected by the conduct.

21 And the government's objection regarding PPIP,  
22 for the same reason we objected because we think it  
23 implicates for the jury whether this conduct in some way  
24 affected them personally by the Treasury.

25 THE COURT: Okay. Well, I want to be careful to



1       avoid that problem. I have to recuse myself if I own a  
2       share of stock in IBM and IBM is implicated in a case  
3       before me, so I'm sensitive to what you're talking about,  
4       and I want to avoid that problem for the jurors who for  
5       all intents and purposes are going to be our judges for  
6       this trial.

7               But even so, I think that the government is in a  
8       position where it needs to offer this typed of evidence  
9       for the reason it states. It goes to materiality with  
10      regard to whether the victim witness who is testifying  
11      should be viewed as a reasonable investor, and I gather it  
12      also does affect the behavior of the person in the  
13      position of the victim witness as the government explains.

14             I understand the defendants do not agree. They  
15      think that the resumes of these witnesses are in  
16      themselves sufficiently impressive to remove any doubt,  
17      and they assert that the individual in the position of the  
18      victim witness owes the same fiduciary duty to everybody,  
19      but that's not something that I can take from the jury.  
20      So I ask whether there is any danger of unfair prejudice  
21      or confusing the issues or misleading the jury or  
22      otherwise by allowing this kind of evidence that  
23      substantially outweighs the probative value with regard to  
24      materiality, and I don't see that, generally speaking.

25             The concern I have is what this motion really

1 addresses is the government's desire to offer the  
2 testimony of Mr. Canter concerning his reaction to  
3 discovering similar fraudulent behavior by Mr. Litvak.  
4 That seems to be what this is really all about.

5 From my perspective based on your submissions,  
6 it appears to me that the government wants very much to be  
7 able to tell that story. It wants to have Mr. Canter tell  
8 the jury about his interaction with Mr. Litvak and his  
9 shock and outrage on learning about Mr. Litvak's lie.

10 Based on your submissions it's my understanding  
11 that the government would like to continue in that vein by  
12 offering evidence that Mr. Litvak was indicted, and the  
13 government would like to offer evidence of the fallout of  
14 that indictment. It seems that what the government has in  
15 mind is a case in which we could find ourselves with a  
16 jury verdict that acquits on the pre-Litvak indictment  
17 trades but convicts on the post-Litvak indictment trade.

18 So in that framework, let me ask: Of the 20  
19 trades that the jury is going to be asked to consider, how  
20 many took place after the Litvak indictment?

21 MR. NOVICK: Two, Your Honor, of the trades were  
22 after the Litvak indictment; however, there were others  
23 that were after news of Mr. Litvak's firing became public  
24 and the reasons for that firing. I think we address that  
25 issue in reporting it to Treasury, and I think we

1 addressed that issue in the most recent filing.

2 The only thing I would ask, Your Honor, is --  
3 and I think Your Honor has hit the nail on the head with  
4 regard to that possibility -- with the Canter narrative,  
5 that really is driven by the issue of materiality, to some  
6 degree intent, but largely materiality, his reaction. And  
7 a lot of the other bases for our offering would really  
8 have to deal with intent and wrongfulness.

9 I think in the most recent filing by Mr. Shapiro  
10 raises the issue that, you know, Litvak doesn't go to the  
11 core issue in this trial, which is materiality. And what  
12 struck me was all along the defense has been raising to  
13 the Court that this case is unlike Litvak in that it's  
14 both about intent as well as materiality.

15 And I think within intent -- it's both about  
16 intent to defraud and harm as well as about wrongfulness.  
17 And I suspect there will be arguments about that with  
18 regards to the jury instructions.

19 But at any rate of course the reaction of the  
20 defendants to this similar conduct is critical evidence of  
21 their knowledge, of their intent.

22 So that's the basis the government proceeds on,  
23 Your Honor.

24 THE COURT: Okay. With regard to Mr. Canter's  
25 interaction with Mr. Litvak, do we have, among our 20

1 trades, any trade involving a misrepresentation about the  
2 price of an RMBS within the PPIP program?

3 MR. NOVICK: Yes, Your Honor.

4 THE COURT: And can you tell me which one?

5 MR. NOVICK: There are two of them.

6 Just one moment please, Your Honor?

7 THE COURT: Okay.

8 (Pause)

9 MR. NOVICK: Your Honor, sorry. So there is a  
10 trade in 2012.

11 Sorry, one in 2011, one in 2012, both of them  
12 with AllianceBernstein.

13 THE COURT: Was Mr. Canter involved in those  
14 trades?

15 MR. NOVICK: Yes. Mr. Canter and Mr. Schiff.

16 The narrative as to the 2012 trade I think Your  
17 Honor has spelled out in our most recent filing involving  
18 Mr. Canter's discovery that he was lied to in the course  
19 of that trade and then raises that within Nomura and then  
20 says something to the effect of -- and I'm going to be  
21 paraphrasing here -- don't you know that I was the person  
22 who just got Jesse Litvak or somebody else fired for doing  
23 something similar for lying to me and reported it to  
24 Treasury?

25 THE COURT: Something similar. Let me clarify.

1                   My question is whether we have a trade in which  
2                   a misrepresentation was made with regard to the price.

3                   MR. NOVICK: That would have been the one the  
4                   year before, Your Honor, I believe.

5                   THE COURT: In other words, Mr. Canter would  
6                   testify that he was a victim of the very same type of  
7                   misrepresentation made by Mr. Litvak when in 2011 he  
8                   transacted with Nomura. In other words, a  
9                   misrepresentation with regard to a price of the bond in  
10                  the context of the PPIP program.

11                  MR. NOVICK: Your Honor, I'm going to have  
12                  Mr. Brennan, since this is his witness, jump in here.

13                  MR. BRENNAN: Good morning, Your Honor, Liam  
14                  Brennan.

15                  Mr. Canter, the evidence we intend to present at  
16                  trial would be that Mr. Canter was lied to in 2011 about a  
17                  trade purely about price in the PPIP program.

18                  Then in 2012, the one that blows up that he  
19                  catches Nomura on, he was lied to both about ownership,  
20                  which he was also lied to about Litvak, and he caught  
21                  Litvak in that lie as well, and about the price.

22                  So what happens is on February 7, Nomura is  
23                  supposedly trying to transact between third-party  
24                  counterparty and Mr. Canter, but then they end up buying  
25                  the bond, then the next day they continued to represent

1       that the bond is being offered at 73 and 16 ticks when in  
2       fact they've already bought it at 72.

3               So it was a lie both about price and about  
4       ownership at that time.

5               THE COURT: Did Mr. Canter call the Treasury  
6       Department with regard to these instances at Nomura?

7               MR. BRENNAN: He did not, Your Honor. And we  
8       expect the explanation would be they caught it before --  
9       so the deal had not settled, even though they had issued  
10      the trade tickets, there's a three day settlement date,  
11      and it was only one where he caught Litvak with multiple,  
12      so he did not report this one.

13              THE COURT: With regard to the post-Litvak  
14      indictment trades, the government says that it's necessary  
15      that the jury be informed of the Litvak indictment because  
16      it provides the context for those trades. It's not only  
17      evidence of materiality and intent, but it provides  
18      context. Is that right?

19              MR. NOVICK: I think, Your Honor, it provides  
20      context in the sense that it eliminates the defendant's  
21      intent or knowledge of wrongfulness, I think is our core  
22      argument there.

23              THE COURT: So let me see if I can tease out the  
24      probative value.

25              Let's suppose that I didn't allow Mr. Canter to

1       testify about his interaction with Mr. Litvak and I didn't  
2       allow evidence of the Litvak indictment, what does the  
3       government's case look like then?

4               MR. NOVICK: It would look differently, Your  
5       Honor.

6               I think that obviously the question of  
7       wrongfulness would be something we would get into with  
8       just the company policies, the rules and regulations from  
9       FINRA. But obviously my suspicion is the defendants are  
10      going to try to advance arguments that say that those  
11      policies and those rules do not cover the specific conduct  
12      that the defendants engaged in that they didn't have  
13      reason to know that this was wrongful. In fact, I'm quite  
14      certain that that would be an argument the defense would  
15      advance, and that's something the government has to prove.

16              So that's why, Your Honor, I think it's so  
17      critically probative both in assessing at the time how the  
18      defendants -- well, in explaining what the defendants  
19      knew. In other words, that now you have an instance not  
20      just where this kind of conduct could by argument be said  
21      to fall within these prohibitions both via compliance as  
22      well as via, you know, SEC rules and regulations. But now  
23      you have an actual example of where this kind of conduct  
24      has A: Gotten somebody fired for having lied to a  
25      counterparty, and it shows intent and materiality; and B,

1     it shows after he gets indicted, that they had reason to  
2     believe that this implicates criminal law.

3             Now, look, the defense could very well argue  
4     that at that time the defendants believed, oh, you know,  
5     yes, the government said it's criminal but we don't think  
6     it is, we continued to believe it wasn't, which is an  
7     argument they could make. But to the extent the  
8     government -- and even -- I mean, particularly on the  
9     defendants' view of the jury instructions, to the extent  
10    the government needs to prove that they knew that it was  
11    in violation of the law or had reason to believe that it  
12    was in violation of the law, there's no better evidence,  
13    Your Honor. And I think that the probative value is  
14    incredibly high here and it outweighs any prejudicial  
15    value, particularly in the sense, as we've argued, that  
16    the fact of another indictment, not a conviction, the fact  
17    of another indictment was something the courts regularly  
18    instruct on, the fact of an indictment at all in this case  
19    is something the courts regularly instruct jurors to  
20    ignore in making a judgment.

21            THE COURT: Well, do you see the problem there,  
22    Mr. Novick? You maintain that the probative value is  
23    critical, unique, very, very important and yet you want me  
24    to instruct the jury that the indictment is irrelevant and  
25    should be ignored.



1 MR. NOVICK: I don't necessarily want you to  
2 instruct, Your Honor, that it should be ignored. I would  
3 limit the -- I think you could craft an instruction with  
4 the parties' assistance that it can be used for a limited  
5 purpose. I shouldn't have said "ignored", Your Honor,  
6 that it comes in for the limited purpose of its affect on  
7 knowledge, affect on the defendants' state of mind, and  
8 that's the limited purpose, at least in that context, that  
9 we're -- or materiality, that we're asking for it to be  
10 considered.

11 You know, the other thing, Your Honor, and I'm  
12 just ticking down the list of things that it bears on, is  
13 also a conversation that Mr. Jones, the head of sales in  
14 New York, has after that 2012 fraudulent trade in which  
15 Mr. Canter said to him that, you know, this is exactly the  
16 kind of conduct I just called out Jesse Litvak on or  
17 called out this other individual on. And then they had  
18 the discussion with Mr. Shapiro who promises, but we have  
19 no evidence that he actually followed through on that, to  
20 go talk to the desk. And that's in 2012, a year before  
21 the indictment.

22 So if we again preclude all evidence relating to  
23 Litvak, we lose another piece of probative information.

24 And then, you know, the junior traders wouldn't  
25 be able to talk about the fallout from that trade; they

1 wouldn't be able to explain what "don't Litvak me" means.  
2 And it doesn't just mean don't lie to me, it means don't  
3 lie to me in the context of there's a guy out there who  
4 did this in violation of -- at least as perceived by the  
5 indictment and within the defendants' state of mind -- in  
6 violation of the law.

7 And we have to prove wrongfulness here.

8 THE COURT: So without references to Litvak,  
9 you'd have the various policies and manuals and so forth  
10 and you would have the witnesses saying don't lie, do not  
11 lie, we do not lie, you have to agree not to lie. You  
12 would have all of that, but you think that the Litvak  
13 related evidence is necessary to rebut any suggestion that  
14 those policies, manuals, statements, et cetera, were  
15 ambiguous and didn't apply to this conduct?

16 MR. NOVICK: I think that's very true, Your  
17 Honor. I think that's very true, based on particularly  
18 the arguments that I've seen already in briefing which  
19 relate to the compliance policies, I think that's true.

20 THE COURT: Okay, thank you.

21 Let me hear from defense counsel.

22 Is it indeed your intention to advance that  
23 argument? Namely, that the manuals and policies and so on  
24 were ambiguous and did not cover this conduct?

25 MR. KLEIN: Judge, Josh Klein on behalf of

1 Mr. Shapiro.

2 I think we do intend to advance that argument  
3 with respect to the conduct that preceded the Litvak  
4 indictment. I think there is ample evidence that the  
5 compliance policies and compliance trainings did not apply  
6 the directive in those compliance policies to this  
7 specific conduct.

8 I think the circumstance surrounding the  
9 termination of Mr. Litvak is a big distraction and I think  
10 it shows nothing more than that there was some  
11 business-related fallout within jeopardy following that  
12 incident.

13 I think all the witnesses in trial are going to  
14 testify that they always perceived potential  
15 misrepresentations in the negotiations as a potential  
16 business issue and that if people were caught, that could  
17 lead to some discussion with counterparties, as occurred  
18 in the AllianceBernstein February 2012 incident. But I  
19 think that the objection with respect to the indictment is  
20 that it injects an enormous degree of prejudice.

21 This is a case, unlike many criminal cases in  
22 which the defense believes there's a genuine issue as to  
23 whether or not the alleged misrepresentations were  
24 material, and once you inject the fact that an unrelated  
25 party at a different firm was indicted for similar

1       conduct, you are in effect telling the jury that these  
2       alleged misrepresentations are material because the jury  
3       is wondering, well, why is somebody being indicted for  
4       this? How can they be indicted in this other case as  
5       well? And if it's coming in with an instruction that goes  
6       to wrongfulness, how can it get to wrongfulness if it's  
7       not material?

8               And so it injects this degree of undue prejudice  
9       into the case that impairs the defense's ability to not  
10      only advance intent defense -- put that aside -- it  
11      impairs our ability to advance the materiality defense,  
12      and we think for that reason it should not come in. It's  
13      unduly prejudicial and it does not in any respect, in any  
14      respect, it does not advance the government's argument  
15      that the pre-2013 policies at Nomura related to the  
16      alleged conduct.

17             THE COURT: What about the post-indictment  
18      trades? Isn't the indictment part of the story there.

19             MR. KLEIN: We believe that with respect to the  
20      post-indictment trades, we don't believe that there's  
21      going to be an argument that -- certainly not on behalf of  
22      Mr. Shapiro -- we don't believe that there's going to be  
23      an argument that there was a view held that engaging in  
24      the alleged conduct was something that was condoned by the  
25      firm.

1 I think that, you know, everyone acknowledges  
2 that post-Litvak indictment there was an understanding  
3 that, at least in the government's view, this was wrongful  
4 conduct, the government has brought an indictment with  
5 respect to conduct. But I don't think you need to get  
6 into any of that because internally there were directives  
7 that traders should not engage in this conduct.

8 And I think what we're saying is that there's --  
9 there are methods by which the government could admit the  
10 fundamental evidence that there was a change of view  
11 within Nomura or within the industry, however they want to  
12 introduce that element, but there's a way of doing that  
13 that doesn't inject the undue prejudice that an indictment  
14 would inject into the case.

15 And I would reiterate that as to Mr. Shapiro we  
16 have an application to strike reference to him in the  
17 overt acts. We don't believe there is any evidence that  
18 he was involved in any such conduct in 2015.

19 THE COURT: Suppose that was denied, do you  
20 still maintain that the post indictment trades can be  
21 properly litigated by the government without evidence of  
22 the Litvak indictment?

23 In other words, I understand that from  
24 Mr. Shapiro's point of view, the post-Litvak trades are  
25 trades in which he did not participate and thus they

1 really had no bearing on him. But let's suppose your  
2 motion fails and the government is permitted to argue that  
3 he was complicit in those post-indictment communications,  
4 would your position remain the same?

5 MR. KLEIN: To the extent that Your Honor is --  
6 I mean, I think our position is that if the government  
7 wants to make those arguments, they can do so without the  
8 introduction of the Litvak indictment. In other words,  
9 they can -- you know, we have proposed that there can be  
10 reference to a litigation development or something along  
11 those lines. They could, to the extent the Court denies  
12 our application, you know, they can make reference to the  
13 compliance directive that occurred following the Litvak  
14 indictment in which the RMBS desk was directed not to make  
15 misrepresentations relating to price in trade negotiations  
16 and, you know, that evidence can come in without reference  
17 to the prejudicial fact that an unrelated party at a  
18 different firm was indicted.

19 THE COURT: All right.

20 Let me hear from counsel for the other  
21 defendants. In light of what has just been said on behalf  
22 of Mr. Shapiro, I'd be interested to get your thoughts.

23 It would be simple enough, I suppose, if  
24 everybody said, yeah, we understood as of January 1, 2013  
25 that you couldn't do this anymore and we never did it

1 again, and while the government suggests that we in fact  
2 engaged in this conduct in 2013, they're wrong, we didn't.  
3 That would be simple enough.

4 Is that your position or are you intending to  
5 argue that, yeah, we did continue to do it but it wasn't  
6 material notwithstanding whatever Nomura said to us in any  
7 training or otherwise?

8 MR. MUKASEY: Judge, it's Marc Mukasey. May I  
9 have one moment, please?

10 THE COURT: Yes.

11 (Pause)

12 MR. MUKASEY: Judge, on behalf of Mr. Gramins,  
13 it's going to be our position that post-Litvak or post  
14 January 1, 2013, we did not violate any laws because we  
15 did not engage in the what was then possibly considered  
16 illegal conduct.

17 So our view is we didn't do anything wrong after  
18 January 1, 2013.

19 THE COURT: Okay. Are you saying that you would  
20 take the position that there were no misrepresentations as  
21 to the price of bonds after January 1, 2013 as alleged?

22 MR. MUKASEY: Did you say "material  
23 misrepresentations" or "misrepresentations"?

24 THE COURT: I said "misrepresentations."

25 So I take it that Mr. Gramins's position would

1 be the same with regard to the pre-indictment trades as  
2 well as the post-indictment trades. There was no material  
3 misrepresentation, in other words?

4 MR. MUKASEY: That's correct.

5 MR. SPIRO: Judge, Alex Spiro on behalf of  
6 Mr. Peters, just a couple of threshold things that I  
7 wanted to address before I get to the ultimate question  
8 the Court is posing.

9 Normally we're not in a position when the  
10 government proffers testimony to sort of reject it or give  
11 the Court another position, but because Mr. Canter's  
12 testified under oath about these incidents, I wanted to  
13 point out two quick things for the Court so the Court is  
14 aware.

15 One thing just to note is obviously his reaction  
16 in Litvak was important because he went to the Treasury.  
17 Here he doesn't. So it would seem to me to support just  
18 the opposite notion, which would make it even less  
19 probative or, if anything, cut the other way.

20 And the other thing that the Court should know,  
21 just in terms of the PPIP stuff, is that, you know,  
22 Mr. Canter testifies that he treats all investors' money  
23 with the same degree of importance, and most investor  
24 decisions, and looks at the same way.

25 So again with respect to those issues, I wanted



1 the Court to be aware of that.

2 Just another point regarding what Mr. Novick  
3 said in terms of that the courts instruct juries all the  
4 time that indictments are not evidence or indictments  
5 don't prove a case. I actually think that proves just the  
6 opposite point here, and I'm sure it's Your Honor's  
7 practice as it is almost all judges, if not all, that when  
8 a jury comes in, you say the evidence will be the evidence  
9 and the indictment is proof of nothing. This becomes an  
10 indictment on top of an indictment, and in my view it  
11 violates the due process clause. There's no way to  
12 cross-examine it, impeach it or do anything with it. It  
13 just exists and you can't fight it. And I think that  
14 becomes particularly meaningful in a case like this.

15 You know, you have both in the Litvak cases and  
16 here all these debates and discussions and legal motions  
17 about, you know, where the line of the law is and it  
18 strikes me that in such a case the introduction of some  
19 other finding of law is wholly prejudicial and improper.

20 And I point to things that are just even in  
21 Litvak -- in Litvak 2/Litvak 1, in the way the Second  
22 Circuit dealt with it, just the fact that they're looking  
23 at the supervisor's direction as being something that's  
24 relevant, that again we've litigated here, and looking at  
25 expert testimony about where lines are, as we litigated

1 here, sort of proves that point, that it's not, you  
2 know -- it doesn't matter what a supervisor says in a  
3 murder case because a murder as we all know is wrong. But  
4 it becomes complicated here, which just bolsters the  
5 improprieties introduced in the indictment.

6 As to the way Mr. Klein and Mr. Mukasey phrased  
7 what we believe the evidence will be and what our response  
8 is post learning of the Litvak indictment, which again to  
9 me the legal development is just as good and doesn't have  
10 any of these same issues, practicalities and everything  
11 else that I've already spoken to the Court about, but we  
12 expect our response to be exactly as Mr. Klein and  
13 Mr. Mukasey related.

14 THE COURT: Okay. Just to be clear in an effort  
15 to avoid any possible misunderstanding, the defense  
16 intends to take the position that no material  
17 misrepresentation was made in any of the subject trades,  
18 whether they occurred prior to Litvak's indictment or  
19 after the indictment? This is not a case, in other words,  
20 where the defense is going to say post-indictment they  
21 understood that these misrepresentations were material and  
22 could not be made and none were made; instead, the defense  
23 intends to take the position that there was no material  
24 misrepresentation in any of these trades regardless of the  
25 date of the trade?

1 MR. BROWN: Judge, Mike Brown on behalf of  
2 Mr. Peters.

3 Our position on the post-Litvak issue is that it  
4 became -- that the fact of the indictment or what the rule  
5 was following the indictment, guidance was provided to the  
6 traders by the Nomura compliance department, so any  
7 uncertainty or ambiguity that existed prior to the Litvak  
8 indictments was clearly stated to the traders after the  
9 Litvak indictment.

10 We will be arguing more in line with the way  
11 Mr. Klein described it than the way that Mr. Mukasey  
12 described it.

13 In other words, our position is that after the  
14 Litvak indictment, Mr. Peters followed the advice and the  
15 guidance that he received from the compliance department.  
16 And in order to prove that, the government, in order to  
17 raise -- the government need not get into the fact of an  
18 indictment because there was a compliance meeting that was  
19 held and guidance that was provided after that, which I  
20 think is the way that Mr. Klein has described it in that  
21 the -- and I think it was the way that the Court went back  
22 to on it -- which is that any ambiguity was cleared up by  
23 compliance as to what is material and what is not  
24 material, and that at least insofar as Mr. Peters is  
25 concerned, he received that additional guidance.

1 MR. MUKASEY: Judge, Marc Mukasey on behalf of  
2 Mr. Gramins. Just in case there's any misunderstanding,  
3 we're going to defend post-Litvak exactly the same way as  
4 Mr. Brown just described, so I think we're all on the same  
5 page.

6 THE COURT: All right, thank you.

7 Mr. Novick, Mr. Brennan, where does that leave  
8 us?

9 MR. NOVICK: Your Honor --

10 MR. KLEIN: Judge, just to complete the picture,  
11 to make sure that we're all clear, it's Josh Klein.

12 With respect to Mr. Shapiro, we are going to  
13 advance the defense that in 2013, Mr. Shapiro did not  
14 engage in any misrepresentations -- trade-related  
15 misrepresentations; and, moreover, that there is no  
16 evidence that he was aware of any trade-related -- alleged  
17 trade-related misrepresentations.

18 THE COURT: Okay, thank you.

19 Where does that leave us then? The government  
20 has been concerned that without the evidence of the Litvak  
21 indictment, it would not be able to rebut the defense that  
22 the internal compliance manual was vague and actually  
23 allowed for this conduct.

24 MR. NOVICK: Your Honor, I think that the way  
25 the defendants are framing what happened here kind of

1 makes the government's points for it.

2 The defendants want to frame this that in lieu  
3 of Litvak they can just put on the evidence of the  
4 compliance presentation because that is a proxy for some  
5 change in policy on the part of the company.

6 So two things on that.

7 First of all, as we have explained all through,  
8 and as I think the witnesses will explain, there was no  
9 change in policy. Lying has always been wrong and within  
10 the company, within the market. And the presentation that  
11 Nadine Cancell gave to the traders, the senior traders and  
12 the sales people, reflected that. It was inspired by or,  
13 I don't know what the correct word here is, it was  
14 suggested by the Litvak -- the fact of the Litvak  
15 indictment, that they ought to have something to remind  
16 people of that. But it was not, if you look at the one  
17 page PowerPoint slide that was given out, it was not a  
18 Litvak specific presentation, it was a compliance  
19 presentation that said do not lie and it had a number of  
20 other things that had absolutely nothing to do with  
21 Litvak.

22 The do not lie was the top line of the  
23 presentation, but then there are other things on the  
24 presentation as well as.

25 It didn't go through and say Jesse Litvak lied

1       therefore you should not lie. It was a reiteration of  
2       prior compliance policy.

3               The fact of the Litvak indictment is entirely  
4       different because it doesn't just reiterate policy, it has  
5       a completely independent basis not just about materiality,  
6       because I understand the defense wants to keep coming back  
7       to that this implies essentially something about  
8       materiality and that they are going to say that there were  
9       no material lies, I suppose, either before or after, which  
10      I understand always, all along, to be their position; but  
11      the government has to affirmatively prove intent, we have  
12      to affirmatively disprove good faith.

13             I don't think that the defendants are going to  
14      get up there and concede that they knew that this  
15      particular kind of conduct was wrongful, was unlawful.  
16      Whether or not they argue that these things were material  
17      or immaterial.

18             I mean, I look, Your Honor, at the defense  
19      exhibits and there are defense exhibits in there which go  
20      to the issue, I believe, if I understand correctly, of  
21      wrongfulness; and this indictment is another piece, a  
22      critical piece, of information in the minds of the  
23      defendants after the Litvak indictment. And then if you  
24      go backwards in time, their knowledge of Litvak's issues,  
25      the fact that he'd been fired for similar conduct for

1     lying about price or about ownership of the bonds, then  
2     you get into an entirely larger range of trades that this  
3     implicates.

4             You know, I'm looking at the indictment now,  
5     Your Honor. Several other trades that occurred between  
6     the time -- or other trades that occurred between the time  
7     of the now discovery and Mr. Canter's phone call, not in  
8     the Litvak issue but with Mr. Jones and Mr. Jones'  
9     subsequent conversation with Mr. Shapiro, and that, you  
10    know, one of the reasons we offered that 21st trade, Your  
11    Honor, was to reiterate the fact that this was occurring  
12    all along; that the defense implication, which seems to be  
13    throughout all of these motions, that these 20 are the  
14    only 20 trades out there, is just not true, and that there  
15    was another misrepresented trade, at least another one  
16    that we offered showing that Mr. Shapiro lied in the  
17    context of a trade after he had had that conversation with  
18    Mr. Canter, after he had that conversation with Mr. Jones.

19            And so, you know, again, Your Honor, this all  
20    comes back to the government's affirmative need to prove  
21    intent, and also to talk about why they moved from the  
22    typing in the Bloomberg chat to the phone, and why the  
23    jury may not see as much conduct post-Litvak as  
24    pre-Litvak. We're going to have witnesses on that. We're  
25    going to have exhibits in which somebody says that guy was

1 the first one to move to the phone after the Litvak  
2 indictment. He's shady.

3 I mean, that kind of encapsulates the whole  
4 point, Your Honor, and saying that there was some sort of  
5 legal development, Your Honor, particularly in a world  
6 where we need to prove either wrongfulness -- not just a  
7 legal development, but wrongfulness -- or unlawfulness, if  
8 you believe the defendants, the fact of the indictments  
9 has real probity.

10 And I would add, Your Honor, it's not as if we  
11 are going to be putting in a copy of the Litvak indictment  
12 laying bare all the things that Mr. Litvak did. It's  
13 going to be extremely limited testimony about the fact of  
14 the indictment and the impact it had on various people, on  
15 the things that it begot. And we believe that that has  
16 significant probative value here.

17 THE COURT: What is the probative value,  
18 Mr. Novick? Are you going to argue that before the  
19 indictment maybe an ethical, responsible person could  
20 think the lie wasn't material, but after the indictment  
21 obviously it was material, the indictment establishing as  
22 a matter of law the materiality of the lie? Is that what  
23 you're going to argue? What is the probative value of an  
24 indictment?

25 Under standard evidence treatises, indictments



1 are typically inadmissible. They're hearsay reflecting  
2 somebody's opinion about what somebody did.

3 MR. NOVICK: Yes, I understand, Your Honor.

4 THE COURT: And normally we spend time educating  
5 the jury that they are to ignore allegations in  
6 indictments because they're just that, they're just  
7 somebody's opinion.

8 MR. NOVICK: Understood, Your Honor. And again  
9 I go back to the idea that we're not asking to put in a  
10 copy of the indictment, because the indictment in and of  
11 itself, Your Honor, I 100 percent agree with you is not  
12 proof of the contents of it. It is something that serves  
13 a number of purposes here.

14 It serves a purpose of telling the defendants to  
15 the extent that it's in their minds of linking this kind  
16 of conduct to the securities laws, they can no longer  
17 claim ignorance that these two things are unrelated.

18 Your Honor, the government's going to argue, and  
19 I concede we thought long and hard about this issue, to be  
20 completely candid, because we don't view a sea change in  
21 what the defendants should have known and did know because  
22 of the clarity in our view of the compliance policies;  
23 however, we do think that it is another thing.

24 Like, Your Honor, asked at the very beginning of  
25 this colloquy whether it's possible the jury would acquit

1 as to the pre-Litvak conduct and convict as to the  
2 post-Litvak conduct. That is a possibility, Your Honor.  
3 That is a reaction the jury could have.

4 We don't think that would be the right one, but  
5 we think a jury could decide if there was ambiguity  
6 previously and that there wasn't afterwards because again  
7 it made that connection. The defendants now understood in  
8 all the context of all of this, goes to the context of  
9 intent and materiality. Intent because now they  
10 understood the connection of the laws with the conduct and  
11 also because materiality, they hear people saying things  
12 like "don't Litvak me" and "that guy moved to the phone."

13 They also know, Your Honor, that the government  
14 was in possession of Litvak's chats and that's why they  
15 moved to the phone. They know that what got Mr. Litvak  
16 indicted was the fact that he's chatting with people about  
17 this stuff, and that provides motive to move to the phone.  
18 And that's another thing that happens. You're going to  
19 hear testimony about that. You're going to hear some of  
20 the phone calls that Mr. Gramins had with one of the  
21 victims, a phone call Mr. Gramins had with Mr. Romanelli  
22 in which they're talking about how they're going to get  
23 more money out of one of the victims. Why did they have  
24 that phone call? Why is his chat or communication with  
25 Mr. Choi, the victim in that case on the other side of the

1 chat over the phone? Why is his conversation with  
2 Mr. Romanelli over the phone?

3 The government is within its right to argue that  
4 that's because they knew that the chats are what got them  
5 in trouble in the first place. We certainly can make that  
6 argument, Your Honor.

7 THE COURT: Okay. Let me follow up, Mr. Novick,  
8 and then we're going to have to get off the phone. The  
9 reporter needs a break and I need a break.

10 Obviously the Litvak piece of this case is very  
11 important to both sides. It's evident from the amount of  
12 time and energy you've given to litigate the Litvak piece.

13 Why is that? Well, the government feels  
14 strongly that it helps its case and the defense feels  
15 strongly that it helps the government's case, and it  
16 presents a unique problem.

17 The government wants to argue to this jury that  
18 it can find these defendants guilty under this indictment  
19 because somebody else got indicted. That's a very unusual  
20 argument, one I've not heard before; and how do you  
21 respond to Mr. Brown's point that there's no way for a  
22 defendant to come to grips with such a pitch by the  
23 government? How does somebody defend against that pitch?

24 You can convict these people under this  
25 indictment because somebody else got indicted in a

1 different case? How do you deal with that?

2 MR. NOVICK: Your Honor, first of all, that  
3 is -- I mean, that is not what the government is saying.  
4 Again, the government is arguing that this goes to  
5 discrete pieces of the case that are things the government  
6 has to prove.

7 We're not saying at all, I think, that the jury  
8 should convict these three defendants because someone else  
9 was charged with the crime hard stop. What we're saying  
10 is that that is a critical piece of knowledge evidence of  
11 what was in the defendants' minds at the time they acted,  
12 critical times they acted; not just the fact of the  
13 indictment, but the fact that they become aware that  
14 Mr. Litvak had the issue; why we know they went to the  
15 phone and why they went to the phone after the indictment.

16 All of these things that I just described, we're  
17 not again -- and that I think is a critical distinction  
18 between what the government is arguing and the way the  
19 defense is defending this -- is we are we are not saying  
20 that -- and I don't think we would ever say that they  
21 should convict Mr. Shapiro and Mr. Gramins or Mr. Peters  
22 simply because someone else was charged with this crime.  
23 We are simply saying that the knowledge of that charge,  
24 the knowledge of the fact that someone else was indicted  
25 for securities fraud because of similar conduct is

1 obviously a critical piece in terms of showing the state  
2 of mind of the defendants at the time they acted.

3 THE COURT: Let me ask you to stop right there,  
4 Mr. Novick, and explain to me why that's true. Take the  
5 last statement that you made and please explain to me why  
6 that's true.

7 MR. NOVICK: Absolutely, Your Honor.

8 Because all of the compliance policies,  
9 everything else in the rules and regulations, everything  
10 else, says -- obviously, we think we've raised this with  
11 the Court -- that lying, material misrepresentations are  
12 wrong, et cetera. And I understand the defendants to be  
13 arguing that they didn't have the intent, they didn't  
14 believe these were material misrepresentations, they  
15 didn't have the intent, and they did not believe that this  
16 was wrongful.

17 I understand the defendants to be defending this  
18 case on the idea that this was not unlawful conduct, not  
19 wrongful conduct, and that they had no way to connect in  
20 their minds the conduct that they were taking with  
21 violation of the law.

22 And what we're saying is that this is a piece of  
23 information, the fact of the indictment, which directly  
24 ties those two things together.

25 It also impacts, Your Honor -- again showing how

1     it impacted, how it changed their behavior -- impacts the  
2     way they worked by moving onto the phones, showing that it  
3     did have an impact on their behavior, showing that it had  
4     an impact on their state of mind.

5             And again so a critical piece of information, a  
6     critical piece of the government's case.

7             We will argue this at that they should have  
8     known or did know all along that this was wrongful, that  
9     these were material misrepresentations, but we can't be,  
10    Your Honor, respectfully, can't be cabined in proving a  
11    case in the various ways that we have available to us.  
12    And this is obviously, as Your Honor pointed out, the  
13    reason why the government feels so strongly about this.  
14    There's no more salient piece of evidence, probative piece  
15    of evidence, that these were potentially implicated -- its  
16    conduct potentially indicates a securities law in the  
17    minds of defendants.

18            And again, not an absolute, right? We're not  
19    saying that the indictment is evidence of the commission  
20    of a crime. It is evidence of the tying of, in the  
21    defendants' minds, their conduct to the securities laws  
22    and it implicates or provides context which describes why  
23    the defendants did what they did afterwards.

24            Just as we use evidence of flight at trial to  
25    explain the state of mind of a defendant. We do things

1     like that all the time, Your Honor, to show why the  
2     defendants did what they did to reflect some guilty  
3     knowledge. And we believe that this is evidence of the  
4     defendants' guilty knowledge. It's evidence of the  
5     defendants' knowledge that what they were doing implicated  
6     material misrepresentations, that it was wrongful.

7             And that's why we continue to press this issue,  
8     Your Honor.

9             THE COURT: Okay. If we put aside that piece of  
10    it, which maybe that surfaced earlier in the case and I  
11    missed it, it could be, but it seems to me to be  
12    relatively new to the discussion, but put that aside for  
13    the moment, as I listen to you, it sounded to me like the  
14    probative value of the indictment lies in the fact that  
15    the defendants learned that the government regarded this  
16    type of misrepresentation as material and would bring an  
17    indictment on that basis if they had the opportunity to do  
18    so. That was the probative value that I heard you  
19    articulate. Is that right?

20            MR. NOVICK: I think I would nuance it a little  
21    bit differently, Your Honor. The probative value is the  
22    tying together of the conduct, in other words, lying to  
23    counterparties with the securities regulations. That I  
24    think is the probative value.

25            THE COURT: So let's suppose the government

1 through the SEC had issued a release saying that, you  
2 would say that that would be admissible for proof of  
3 intent with regard to any subsequent activity, right?

4 MR. NOVICK: If that were the case, Your Honor,  
5 yeah, I think that's right; it would be probative evidence  
6 if the SEC issued a release.

7 But again, it's different because we're talking  
8 about laws of the United States versus rules and  
9 regulations of the SEC. And to the extent that we need to  
10 prove wrongfulness, either it's just wrongfulness or  
11 unlawfulness, and again I don't know where the Court is  
12 going to go with this. There is a distinction,  
13 particularly when it's reflective of the defendants' mind.

14 Because again we don't need to prove  
15 wrongfulness in absolute terms, we need to prove the  
16 knowledge and the state of mind of the defendants.

17 THE COURT: If you step back, and I am going to  
18 have to conclude here, if you step back and look at this  
19 in the broadest terms, we have a party here, the U.S.  
20 government, vying for an opportunity to bring to the  
21 attention of this jury the fact that it indicted somebody  
22 else for very similar conduct, and the government views  
23 that as very important, it views it as a critical part of  
24 the case.

25 In this very case the defendants are saying that



1 they don't agree with the government notwithstanding their  
2 own indictment in this case, they're saying the government  
3 is wrong.

4 How is the defendant facing this rather unusual  
5 case theory? How is the defendant supposed to deal with  
6 the indictment of the other person? How is the defendant  
7 supposed to respond?

8 MR. NOVICK: Your Honor, here's -- I mean, the  
9 problem here with that issue is just like in many other  
10 cases, these are the facts of the case. The fact that the  
11 defendants reacted to the indictment and the implications  
12 that had for their conduct subsequently. Those are just  
13 the facts.

14 The fact that the indictment became a thing in  
15 the market, became a thing within the RMBS trading desk,  
16 became a thing that motivated other people to say things,  
17 that caused the defendants to act in a different way, all  
18 those things are just facts of this case. And what the  
19 defendants are suggesting is to, I believe, Your Honor, is  
20 to artificially take a critical piece of information out  
21 of this trial.

22 To the extent that I hope that this trial is a  
23 search for the truth of what happened here, what was in  
24 the defendants' minds at the time all this was going on.  
25 What they're essentially suggesting is to take one of the

1 most significant pieces of information that could bear on  
2 the defendants' intent out of the trial.

3 So we're going to be left with this kind of  
4 artificial construct, and which now the defendants are  
5 going to come and they're going to say, well, there was  
6 this do not lie conference in, you know, January or  
7 February of 2013, and that Mr. Shapiro came and he said,  
8 you know, to the desk, you know, do not lie, with having  
9 no idea where that came from, what that was, that there's  
10 going to be evidence that they moved to the phone after  
11 February of 2013 and stopped chatting as much with these  
12 kinds of issues, and we're going to have no idea why that  
13 occurred.

14 We're going to be taking out of the trial a  
15 critical piece of information that was in the minds of the  
16 defendants, was in the minds of some of the victims, was  
17 in the minds of the testifying co-conspirator witnesses,  
18 artificially and creating essentially a trial that is not  
19 going to be, at least in the government's view, now a  
20 search for the truth but an effort to manipulate sort of  
21 the facts now for the benefit of, you know, an argument  
22 the defendants want to make.

23 And we just view this evidence as important in  
24 that respect, Your Honor, is to complete the picture, to  
25 understand what was in the defendants' minds, why

1 everybody did what they did.

2 And it just, again, it is for all the reasons  
3 I've said before. I understand Your Honor is under time  
4 pressure here. We believe it was a critical piece of  
5 evidence that was present. It was there and it was of  
6 what everybody was thinking about and it drove how they  
7 reacted.

8 THE COURT: Help me understand this part of it,  
9 if you would, please, Mr. Novick: As I understand it,  
10 most of the trades that the jury will be asked to consider  
11 in this case occurred before Mr. Litvak was indicted.

12 MR. NOVICK: Yes.

13 THE COURT: So how could the fact of the Litvak  
14 indictment and its impact on the market and these  
15 individuals have any bearing object the majority of the  
16 trades at issue?

17 MR. NOVICK: Well, a couple of things, Your  
18 Honor.

19 First of all, they're obviously critical  
20 evidence that related to the trades that occurred after  
21 the indictment. And as Your Honor said at the very  
22 beginning, we don't think, and I said this a couple of  
23 minutes ago, while we don't think it would be a right  
24 result, a jury could theoretically decide that that was a  
25 significant moment in the market and that any lies after

1 that should be treated differently than lies before that.  
2 That's a thing the jury can do. And to the extent we are  
3 seeking the truth and seeking a just result here, I don't  
4 want to deprive the jury of the ability to make a decision  
5 if they think it's fit. We're going to argue against that  
6 distinction. And so, you know, that's the for instance.

7 The second thing, Your Honor, is we know that  
8 they -- because of the Litvak indictment -- and by the  
9 way, Your Honor, the defendants -- well, withdraw that.

10 We know because of the Litvak indictment that  
11 everybody moved to the phone -- not everybody -- a lot of  
12 the traders moved to the phone more frequently, knew that  
13 chats were going to be a problem, and did that more and  
14 chatted -- excuse me -- used the phone more and chatted on  
15 Bloomberg less.

16 So that's a thing that would explain why there's  
17 fewer fraudulent trades after. It's also just simply more  
18 time before the Litvak indictment than there is after.  
19 When the government's investigations began, the defendants  
20 were put on suspension. So we're really talking about a  
21 year timeframe versus a -- you know, post indictment  
22 versus a three-year, four-year timeframe beforehand.

23 You know, in addition to that, Mr. Shapiro had  
24 been promoted and so he at that point is trading less and  
25 supervising more. And just in terms of volume, you know,

1       it's different.

2                   And so I think that answers the question Your  
3       Honor asked.

4                   THE COURT: I don't want to prolong this, but in  
5       all fairness, Mr. Novick, you really didn't. The question  
6       related to the trades before the indictment.

7                   How can the fact of the indictment have any  
8       bearing on those trades which comprised the majority of  
9       the trades at issue?

10                  MR. NOVICK: Sure. So two things, Your Honor.

11                  I think that the fact that they moved to the  
12       phones after the indictments and did more work on the  
13       phones after the indictment is reflective of the idea that  
14       they had intended to do wrong the entire time.

15                  THE COURT: That's what I was wondering. That's  
16       something I need to think about because it strikes me that  
17       that's what may be in store for us, that you would wind up  
18       arguing to the jury that no matter what they might make of  
19       the pre-Litvak indictment trades, without the benefit of  
20       the Litvak indictment, once that indictment came down, we  
21       see people behaving in a way that shows they were bad news  
22       all along.

23                  MR. NOVICK: Yes, Your Honor.

24                  THE COURT: Their post-Litvak indictment  
25       behavior allows the jury to find that they had a guilty

1 state of mind prior to the Litvak indictment.

2 MR. NOVICK: Precisely, Your Honor.

3 THE COURT: Okay. Well, last question on this.  
4 If Mr. Litvak had never been indicted, would we be dealing  
5 with this case? If Mr. Litvak had never been charged and  
6 everything else remained the same, would we have this  
7 case?

8 MR. NOVICK: Your Honor, that's a tricky  
9 question, because I think if the way this all played out,  
10 which I think we described in one of our filings, the fact  
11 that Mr. Canter had found what Mr. Litvak had done, begot  
12 that case and opened our eyes to this issue in the  
13 marketplace and then begot all the inquiries that we made  
14 to the various, SEC and then DOJ, to the various other  
15 banks trading in this marketplace, who then did their own  
16 internal investigations and found the evidence that they  
17 found.

18 So I think the answer is no. Well, maybe we  
19 would have eventually found it, I don't know, but facts on  
20 the ground are such that the way the Litvak case unfolded  
21 and the way the government proceeded from there, the  
22 Litvak case was the beginning of that narrative.

23 THE COURT: Can you point to any precedent for  
24 in effect clarifying legal standards that apply in the  
25 securities industry through the process of an indictment

1       rather than agency regulation or some other means? I'm  
2       thinking about this in the broadest terms.

3               I have a case in which people apparently can say  
4       that at the time they engaged in most of these trades,  
5       they believed in good faith that what they were doing was  
6       not illegal. No one had ever been charged with doing  
7       this, even though everybody did it, and certainly nobody  
8       had ever been convicted of doing it. They thought that it  
9       was okay, and the government has decided to use the  
10      criminal law as a means of educating the people in this  
11      industry about where the line is.

12             Do we have a precedent for that? Is there any  
13      other area of securities regulation where the government  
14      proceeded by way of indictment rather than some lesser  
15      means?

16             MR. NOVICK: I guess I'm not completely  
17      following. Are you saying, Your Honor, precedent to show  
18      that -- I mean, there are many white collar cases where  
19      the -- I have white collar cases where the defense is  
20      "here's what I did, I didn't think it was wrong," and the  
21      government has to prove that it was wrong, that it was  
22      illegal.

23             You know, I think that's pretty common, and  
24      certainly, you know --

25             THE COURT: Do you have any case where the

1 government was allowed to offer evidence of an indictment  
2 of someone else in a previous case in order to prove guilt  
3 in the charges under an indictment on trial? Any other  
4 case where an indictment was used for the purpose for  
5 which it's being sought to be used here?

6 MR. NOVICK: I don't have a case either way,  
7 Your Honor, either allowing it or disallowing it.

8 THE COURT: Okay, all right.

9 With regard to other things, very, very quickly,  
10 I'm going to go through this list that I have.

11 I've talked about the motion to exclude evidence  
12 and argument regarding the defendants' compensation.  
13 That's ECF-160, and that's granted in line with what I  
14 said before today. If the government wants to offer the  
15 spreadsheet, it's going to need to persuade me that it  
16 should be allowed to do so. Based on the analysis to  
17 date, I don't see that it should come in.

18 With regard to the motion to preclude evidence  
19 and references to the PPIP program and the identities of  
20 passive investors and the funds managed by counterparty  
21 institutions, ECF-162, that's granted in part. I am not  
22 persuaded that Mr. Canter should be allowed to discuss his  
23 reaction to his discovery of Mr. Litvak's  
24 misrepresentation. It's something that I need to think  
25 about some more in light of our conversation today, but I



1 want the government to realize that it's in doubt.

2 I think that the government should be able to  
3 offer evidence of the identities of the passive investors  
4 in these funds, and that includes charities, college  
5 endowments, et cetera. I think that any danger of unfair  
6 prejudice or anything else arising from that evidence can  
7 be adequately dealt with through a jury instruction, and I  
8 think it's important to educating the jury about what  
9 these people are doing when they trade on behalf of these  
10 passive investors.

11 With regard to the PPIP program in particular,  
12 if we're going to be hearing from Mr. Canter about his  
13 interactions with the defendants in the context of the  
14 PPIP program, then that answers itself. If that's going  
15 to be evidence here, then there's nothing for me to say,  
16 that trade or trades is part of the case and I'm not going  
17 to conceal the PPIP program if we have PPIP trades.

18 With regard to the motion to preclude admission  
19 of the FINRA study guides absent proper foundation, we  
20 discussed this at a court session awhile ago and I said by  
21 its terms this motion should be granted. It's  
22 self-evident that in the absence of a proper foundation  
23 the guides can't come in. That's the last I know we  
24 touched on this, and so I'm granting that motion on the  
25 same basis. If the government proposes to use the FINRA

1 guides, I presume it proposes to lay a proper foundation.

2 That was ECF-163 for the benefit of the clerk.

3 The motion to exclude evidence that the  
4 defendants acted as agents or brokers or owed any agency  
5 duties to counterparties, ECF-164, I believe we resolved  
6 that at that court session. There isn't going to be any  
7 suggestion by the government that the defendants owed  
8 fiduciary duties to the counterparties, and so that motion  
9 can be granted.

10 MR. NOVICK: I'm sorry, Your Honor, from the  
11 government's perspective there was another part of that, I  
12 think.

13 We obviously concede that we're not going to  
14 suggest that there's an agency relationship as a matter of  
15 law, but I think the defendants were also looking to  
16 preclude the testimony of the witnesses that they  
17 perceived one and that they were made believed by the  
18 defendants that there was one. And I believe my  
19 recollection, it's been a long time, Your Honor, that the  
20 Court was inclined to permit the witnesses to testify in  
21 that manner.

22 THE COURT: Yes, yes. I see that Judge Hall  
23 dealt with that in her recent ruling on the motion for  
24 judgment of acquittal of a new trial. She described that  
25 testimony in great detail. I think that if we have a

1 witness who wants to say that he thought that the  
2 defendant was acting as his agent, he could be  
3 cross-examined on that.

4 MR. NOVICK: Thank you, Your Honor.

5 THE COURT: With regard to the motion to exclude  
6 evidence of the absence of criminal activity, ECF-159, I  
7 don't know where that stands. Is that still something  
8 that you are disputing? Or is that moot?

9 MR. NOVICK: Yes, Your Honor, I think -- I don't  
10 know to what degree the -- one moment, please, Your Honor,  
11 I'm sorry.

12 (Pause)

13 MR. BRENNAN: Your Honor, Liam Brennan here, we  
14 are -- our motion was to preclude the actions to criminal  
15 activity in all there are like thousands of other trades,  
16 and that is something persisted in. I think the question  
17 is whether the defense intends to bring in the non-charged  
18 trades, the ones that aren't the 21 trades we've given  
19 notice we're going to introduce.

20 MR. MUKASEY: Your Honor, if I may address Liam  
21 briefly.

22 I think we've tried to meet and confer on this,  
23 and I thought we had. I thought we've sort of reached an  
24 agreement that there could be reference to many, many  
25 other trades both by you and by us, but you would not

1 characterize them as criminal or wrongful and we would not  
2 characterize them as all innocent. So simply as part of  
3 the universe of what these guys did over four years.

4 I thought we had agreed on that, or at least we  
5 had agreed to try to agree on that. And that would be at  
6 least a proposal from Mr. Gramins, if not all three  
7 groups.

8 MR. NOVICK: Your Honor, Mr. Novick.

9 Why don't we just continue to confer with  
10 counsel on that and we can reraise it with the Court if  
11 necessary.

12 THE COURT: Okay, then, I'll deny that without  
13 prejudice to renewal. That's ECF Number 159.

14 The next one, the government's motion to  
15 preclude evidence or argument blaming victims. We talked  
16 about this at a court session, and the upshot of it is  
17 that the motion is denied. The defendants are entitled to  
18 offer evidence that the victim witnesses did not conduct  
19 themselves in the manner of a reasonable investor.

20 The next motion, ECF-166, to preclude evidence  
21 or argument regarding fair market value, again I ruled on  
22 that in essence at a previous court session. That motion  
23 is granted.

24 The next motion relatedly, ECF-167, to preclude  
25 evidence regarding profitability, I'm not exactly sure

1 what the defendants have in mind in that regard, but it  
2 would be helpful if you could educate me, we can't do it  
3 now, but to the extent that remains open, to the extent  
4 the defendants intend to offer evidence that these trades  
5 were in fact profitable, I would ask you to discuss that  
6 with the government and see if you can work that out. If  
7 you can't, fine, I'll deal with it, but I'm going to deny  
8 that without prejudice to renewal pending that discussion.

9 Next one, motion to preclude evidence regarding  
10 other broker/dealers, ECF-187, again, I don't know where  
11 that stands today, so I think I'm going to treat it the  
12 same way. I'm denying it without prejudice to renewal on  
13 the understanding that if the defendants seek to offer  
14 evidence in that vein, they will confer with counsel for  
15 the government and in that way give the government fair  
16 notice of exactly what they have in mind, and then the  
17 government can renew its motion if it wants to.

18 There's a motion regarding expert witnesses,  
19 which I think we've addressed.

20 This leads me to the latest motions.

21 I've got Mr. Shapiro's motion to strike  
22 surplusage. That motion is denied for substantially the  
23 reasons stated by the government, and the alternative  
24 request to admit evidence relating to Nomura's internal  
25 review is denied for substantially the reasons stated by

1 the government.

2 With regard to the Litvak indictment and  
3 references to the Litvak indictment, as you can tell from  
4 today's discussion, I'm still thinking about that. You've  
5 submitted papers as recently as last week which I've read,  
6 but I need to think more about it and I'll get back to you  
7 on that.

8 Let me see if there's anything else that I need  
9 to talk about.

10 (Pause)

11 THE COURT: The Scadden report and Mr. Harrison,  
12 I think we've sorted that out in court. The defendants  
13 are not going to be offering that report, at least not as  
14 far as they know at the moment, but they want to be able  
15 to cross-examine Mr. Harrison about the conduct, and I  
16 think that's fair game for cross-examination.

17 Whether we will get into what happened to  
18 Mr. Harrison's employment is something that I'm not in a  
19 position to say at the moment. It may well be that  
20 cross-examination will naturally wind up getting there  
21 even though there's no intent to go there right off the  
22 bat.

23 In general, I agree with the government that  
24 personnel decisions made by these employers should not be  
25 a part of this case.

1           We talked about the summary charts. You were  
2 going to have a follow-up on that. As I said, I think  
3 summary charts are useful, probably unavoidable, and it's  
4 just a question of whether the charts themselves are  
5 somehow or other inaccurate or otherwise unfairly  
6 prejudicial.

7           I think that takes care of everything that I  
8 needed to deal with today, and in any event, we need to  
9 adjourn, so please continue to talk and get back to me if  
10 you need anything further from me. In the meantime, I'll  
11 continue to think about the Litvak part of this and I will  
12 be in touch with you.

13           There is one last point.

14           With regard to jury instructions, in your recent  
15 submissions reference is made to your competing requests  
16 for instructions on the elements of the offenses. My  
17 question for you would be: Why shouldn't I use Judge  
18 Hall's instructions as a starting point? She devoted  
19 substantial time and attention to these matters in the  
20 course of those two trials and heard extensive argument  
21 and wound up with a set of jury instructions that I  
22 believe went to the jury without objection, or if there  
23 was objections, there weren't too many. My sense is that  
24 they were able to come up with a set of instructions that  
25 made everybody reasonably happy.

1                   So my question for you would be: Why shouldn't  
2 we use her instructions as a starting point recognizing  
3 that they would need to be tailored to our case, but on  
4 such things as a general statement of the elements of the  
5 offenses, why couldn't we use the instructions that were  
6 used there. I'd be interested to hear back from you on  
7 that. You could email Katie and let her know your  
8 thoughts.

9                   Thank you all, I need to run.

10                  MR. MUKASEY: Judge, can you just really quickly  
11 seal the portion of the transcript in which you referred  
12 to the defendants' compensation today, Judge?

13                  MR. BROWN: We join in that, Your Honor.

14                  THE COURT: Yes, that will be sealed.

15                  SPEAKER: Thank you, Your Honor.

16                  MR. NOVICK: Thanks, Your Honor.

17                  THE COURT: All right, thank you.

18                               (Proceedings adjourned at 11:45 a.m.)  
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C E R T I F I C A T E

In Re: U.S. vs. SHAPIRO

I, Darlene A. Warner, RDR-CRR, Official Court Reporter for the United States District Court for the District of Connecticut, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/s/ \_\_\_\_\_

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